No. 3156

In The United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM M. COLLINS,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 3156.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *Judge.*

BRIEF OF PLAINTIFF IN ERROR

H. E. FOSTER,
Attorney for Plaintiff in Error.
New York Building, Seattle.

CALVERT-CALHOUN PRINTING CO., SEATTLE

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STATEMENT.

The plaintiff in error was indicted in an indictment returned by the Grand Jury at Tacoma, Washington, containing two counts. Count 1 charges that

he made and conveyed false reports and false statements with intent to interfere with the operation and success of the military forces of the United States and to promote the success of its enemies. (Trans. 1.)

The plaintiff in error demurred to this indictment which was overruled and a Bill of Particulars ordered furnished. (Trans. 3-4-148.)

Bill of Particulars so furnished recites: That Collins, plaintiff in error, said " * * * they were starving the soldiers at Camp Lewis." "That the soldiers had to come into town to get enough to eat and that better care would have to be taken of them in France or they would have a revolution over there." (Trans. 148.)

Plaintiff in error was placed upon trial and convicted under Count 1 and acquitted under Count 2. (Trans. 8.)

Motion for New Trial was made which was denied and overruled. (Trans. 8-10.)

Motion in Arrest of Judgment was made which was denied and overruled and defendant sentenced to a term of fifteen months in the United States penitentiary. (Trans. 10.)

ASSIGNMENT OF ERRORS.

I.

The court erred in holding the plaintiff in error

for trial and permitting evidence to be introduced after the jury was impaneled for the reason that the indictment is wholly insufficient, and each count thereof, upon its face.

II.

The court erred in receiving evidence offered by the United States and at the time objected to by the plaintiff in error.

III.

The court erred in refusing to sustain the plaintiff in error's motion for a directed verdict after the jury was sworn and before any evidence was offered.

IV.

The court erred in refusing to sustain the plaintiff in error's motion for a directed verdict at the close of the evidence offered by the United States.

V.

The court erred in rejecting evidence offered by the plaintiff in error.

VI.

The court erred in refusing to sustain the motion of the plaintiff in error for a directed verdict at the close of all the evidence.

VII.

The court erred in refusing to charge the jury as requested by the plaintiff in error.

(a.) In refusing to give plaintiff in error's requested instruction No. 1:

The jury is instructed that if any member entertains any bias or prejudice or feeling against the defendant by reason of his affiliation with the Industrial Workers of the World, or because he occupies some other position, it is your imperative duty to lay aside that prejudice, bias or feeling and not let it interfere with your verdict.

(b.) In refusing to give plaintiff in error's requested instruction No. 2:

The jury is further instructed that it is encumbent upon the jury, and each and every member thereof, to presume the defendant innocent of the offense with which he stands charged, and that presumption must be observed by the jury and the defnedant given the benefit of the same until his guilt is established to the satisfaction of the jury beyond a reasonable doubt.

(c.) In refusing to give plaintiff in error's requested instruction No. 3:

The jury is further instructed that when a conflict arises in the evidence it is necessary for the jury to reconcile such conflicting evidence insofar as it may with a view of the innocence of the defendant; that when two constructions can be placed upon the testimony that construction should be observed by the

jury that will support the presumption of innocence of the defendant rather than a construction that would support a presumption of guilt.

(d.) In refusing to give plaintiff in error's requested instruction No. 5:

The jury is further instructed that before a person could be legally convicted of an offense such as is charged in the first count of the indictment it would have to appear that the party made and conveyed false reports and false statements knowing the same to be false, with an intention that they should be acted upon by some one connected with or who might be connected with the military authority of the United States.

VIII.

The court erred in refusing to sustain the plaintiff in error's motion for a new trial.

IX.

The court erred in overruling plaintiff in error's motion in arrest of judgment.

POINTS AND AUTHORITIES.

Plaintiff in error insists that count one of the Indictment is insufficient in law and will not sustain an adverse finding against him. Count one could have no other function than to create in the minds of the jury a feeling of bias and prejudice. This count charges that the plaintiff in error did wilfully, know-

ingly, unlawfully and feloniously make and convey false reports and false statements with the intent to interfere with the operation and success of the military and naval forces of the United States and to promote the success of its enemies. This does not in law make a valid indictment. Such stipulations consist of the opinions and conclusions of the pleader and are wholly inoperative as operative facts.

The plaintiff in error was acquitted on count two; which count consisted of opinions and conclusions and contained no facts. However, what has been said about count two will have equal, if not greater, force with count one. Count one charges that the plaintiff in error did wilfully and feloniously make and convey false statements and false reports with intent to interfere with the success of the military forces of the United States. Plaintiff in error contends that this count consists simply of a recital of opinions and conclusions; that the indictment is wholly insufficient unless it contains facts from which such conclusions would necessarily flow. Plaintiff in error contends that it is elementary that the indictment must embrace all material facts and circumstances, and unless the indictment contains the same, it is fatally defective. The language of the statute may be used in a general description of the offense, but it must be accompanied with such a statement of facts and circumstances as

will inform the accused of the specific offense, coming under the general description, with which he is charged. Such specific facts are matters of substance and not of form. That the defendant has a constitutional right to be informed of the nature and cause of the accusation. That a crime is made up of acts and words and these must be set out in the indictment with a reasonable particularity of time, place and circumstances. That it is an elementary principle of criminal pleading that were the definition of an offense, whether it be of common law or statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the general generic terms as in the definition.

In *U. S. vs. Hess,* 124 U. S. (31 L. ed. 516), the defendant was indicted in an indictment containing two counts, and the case was submitted to the jury upon the second count which charged the defendant with the commission of an offense in the language of the statute. In the opinion the court made the following observations:

"As a foundation of the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial."

"The averment here is that the defendant, 'having devised a scheme to defraud other persons to the jurors unknown' intended to effect the same by inciting such other persons to communicate with him through the

post office, and received a letter on the subject. Assuming that this averment of 'having devised' a scheme may be taken as sufficiently direct and positive, the absence of all praticulars of the alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken."

Plaintiff in error most respectfully insists that this authority is sufficient, if authority is necessary, to show beyond doubt the inefficiency of count one to sustain an adverse finding against him. It no doubt will be contended that the insufficiency of the indictment was supplemented by a Bill of Particulars. Plaintiff in error most respectfully contends that a defective indictment cannot be made good by a Bill of Particulars; that the function and purpose of a Bill of Particulars is not to supply defective pleadings.

Plaintiff in error most respectfully contends that the indictment is wholly insufficient and that his demurrer tendered should have been in all respects sustained and the plaintiff in error discharged. That the Bill of Praticulars so furnished is wholly insufficient to even furnish any accurate information. It cannot be inferred or presumed that the plaintiff in error made a false statement unless such statement was set out and averment was made that it was made to someone in the military forces or of military age and fitness, or, in some other capacity that might from facts stated have a tendency to militate against the military forces

of the United States. The Bill of Particulars is simply a mere nothing so far as a legal document is concerned.

The plaintiff in error also earnestly insists that his motion in arrest of judgment should have been sustained for the reason stated, that the indictment is so defective that it could not properly sustain an adverse finding against him.

U. S. vs. Hess, supra.

After the jury was impanelled and sworn and a witness offered, plaintiff in error objected to the court receiving any evidence and moved the court to instruct the jury to return a verdict of not guilty for the reason that the indictment was wholly insufficient to sustain an adverse finding on either count. This was denied and overruled. (Trans. 2-7-14-25.)

Plaintiff in error contends that he was entitled to the benefit of a doubt throughout the entire proceedings. That he was entitled to the benefit of that with the Judge as well as the jury, and, from the court's observation in disposing of the motion for a directed verdict before evidence was heard, the plaintiff in error contends that he was not given the benefit of a doubt. This motion was based upon the insufficiency of the indictment, and, to each count, and the contention of the plaintiff in error is sustained by the authorities cited.

Most of the evidence offered on behalf of the

government, the plaintiff in error contends, was improperly received, and the same could not be fully set out. For instance: the direct evidence of Calvin S. White (Trans. 68-70.) The evidence of this witness is not only incompetent, irrelevant and immaterial, but strictly prejudicial. The admission of such evidence would have a strong tendency to create a feeling of bias and prejudice in the mind of a juror to the prejudice of the plaintiff in error.

Serious objection was made to the testimony in chief of Jesse F. Murphy, the prosecuting witness, a resident of Seattle, who happened to be in Montesano in December, 1917, and, in going into a pool room ostensibly for a newspaper heard a part of a conversation that was indulged in by several men and from the parties he singled out the plaintiff in error and became the prosecuting witness in the proceedings in the court below. There is not a suggestion in the indictment that anything was said by the plaintiff in error in the presence of men of draft age or of military age or fitness, but much evidence was admitted over objection of plaintiff in error. (Trans. 17.)

The plaintiff in error seriously objected to the testimony of the witness, Murphy, (Trans. 18, 19) about the conversation for the reason that the same is highly prejudicial and the observations of the court (Trans. 19) carries the impression to the jury that

the language used in the indictment had all the force and effect of what the witness Murphy might be saying. The plaintiff in error contends that the recitals in the indictment are simply the conclusions and opinions of the pleader and can nowise be associated with the use of language.

For the purpose of showing the attitude of Murphy and showing what hostility Murphy, if any toward plaintiff in error bore, he was asked on cross-examination if he did not do what he could to get the plaintiff in error indicted. Objection was sustained to this on the application of the government. Plaintiff in error contends that he has a primary right to show the hostility of the prosecuting witness and that question was competent for that purpose. (Trans. 22.) For the further purpose of testing whether or not the prosecuting witness had heard any complaints about soldiers being dissatisfied with the food at Camp Lewis about the time the camp was opened, inquiry was made and the plaintiff in error was not given the right to have the question answered. (Trans. 25.)

Plaintiff in error contends that these inquiries are competent for several reasons. It was within the range of cross-examination, and, if it could be shown that such conditions existed, it would show a reason or motive for the discussion.

The inefficiency of the indictment becomes promi-

nent again when the testimony of Bruce Pettijohn, (Trans. 30), is examined. Many constructions that could be placed upon the words the plaintiff in error might have used or the substance of what may be used would have a tendency to prejudice him with the jury and without the plaintiff having an opportunity in advance of knowing what he might be called upon to meet. The government will say that he was furnished a Bill of Particulars. That is correct but the Bill of Particulars was furnished the day the case came on for trial (Trans. 148-113), and the same is very brief.

It seems that an argument and discussion was going on in the pool room when the plaintiff in error entered, (Trans. 33), and several were engaged in it (Trans. 35) and the plaintiff in error stated that he knew of soldiers who had said what he had said (Trans. 39). It is contended on behalf of the plaintiff in error that the statement what soldiers said to him was competent to show whether or not what was said, if anything, was said with intent to interfere with the operation and success of the military forces of the United States or to promote the success of its enemies.

Witnesses testified that things were discussed about the war and about Camp Lewis at this hearing. The following question was propounded to the wit-

ness Pettijohn: "Well, these things about war in Camp Lewis are discussed around places where men congregated, are they not?" Objection to this question was sustained by the court on the theory that the jury knows as much about that as the witness. (Trans. 41.)

Plaintiff in error contends that this was a matter which should have gone to the jury. The jury was not inquired what they knew in reference to this matter. The several members had promised to determine the case from the evidence under the court's instructions and plaintiff in error contends that this was a proper inquiry. The witness, Pettijohn, does not agree with Murphy in many material things. Murphy contends that there was something said about France; Pettijohn said nothing was said about France. These matters, however, will be discussed later.

What was said about the testimony of Calvin S. White will apply with equal force to the testimony of A. D. Young. (Trans. 73-79, inclusive.) The plaintiff in error was not permitted to inquire on cross-examination of witness Young anything relating to the condition that might exist in the City of Tacoma in reference to the soldiers at Camp Lewis and at the time of the evening meal. This witness had testified in reference to the nature of the food that was furnished at Camp Lewis, and an attempt to cross-examine

(Trans. 79) for the purpose of showing that this witness had seen many soldiers from the camp taking their evening meal at Tacoma was prevented.

The plaintiff in error contends that there was not sufficient evidence in this case tendered by the government to take the case to the jury, and that his motion for a directed verdict at the close of all the evidence should have been sustained. The evidence of Murphy, the prosecuting witness, is unsupported in any particular. The first count in the indictment charges that the plaintiff in error made and conveyed false reports and false statements with the intent to interfere with the operation and success of the military forces of the United States and to promote the success of its enemies. To recapitulate upon the evidence: the statements of the prosecuting witness with his anxiety to tell something on the plaintiff in error do not show that this man conveyed false reports, made false statements with the intent to interfere with the military forces or aid the enemy. It is not contended that an enemy was near or in close proximity. The indictment does not contend that it operated upon the mind of anyone to the detriment of the service, and could not be with the construction placed upon it by the prosecuting witness. It could not have that effect, as he says he might not be using the exact language. (Trans. 18-19.) If he is not using the exact language then it

would simply be the conclusion and construction placed upon words that were assumed by the prosecuting witness to say what he wished to apply to them in this particular case.

The witness, Pettijohn, testified that an argument was going on when the plaintiff in error entered and had been going on before the prosecuting witness entered the pool room (Trans 30); and several were engaged in the conversation. (Trans 35.) That the plaintiff in error said he knew of soldiers who had said such things (Trans. 39) and that he heard nothing said about France (Trans. 41), and that a party in the conversation named Watson did the loudest talking. (Trans. 42.)

The government witness, Johnson, (Trans. 49) testified that he heard the conversation and he heard the plaintiff in error saying that he had heard soldiers talk about the foodstuffs at the camp and that they had told him that they had to go to Tacoma to get a square meal and at that point the prosecuting witness became very loud. (Trans. 49.)

The amount of food that was furnished the soldiers at Camp Lewis or the nature of the bills of fare were surely not material. The only question plaintiff in error contends was material was whether or not false reports were made, false information given to people of military age or fitness with the intent to interfere

with the operation and success of military forces of the United States and to promote the success of the enemies. The plaintiff in error contends that this evidence does not support such words by a *prima facie* showing and is wholly insufficient to overcome the presumption of innocence that at all times surrounds a defendant in a criminal case.

The plaintiff in error further contends that the observation (Trans. 102) of the court in denying his motion for directed verdict made in the presence of the jury prejudiced the rights of the plaintiff in error and his standing before the jury was thereby prejudiced and lowered, and from such observations the jury might easily infer that it was the duty of the plaintiff in error, if he mentioned anything, to mention it in such a way that it could not be construed as a criticism, and therefore the plaintiff in error contends that he was denied a constitutional trial for the reason that it could not in law be a fair trial. Such observations would prevent an impartial consideration of the evidence, and would prevent the jury from reconciling conflicting evidence with a view of the innocence of plaintiff in error.

The plaintiff in error testified as a witness on his own behalf and his testimony is found in the record (Trans. 103-124) and there is a sharp conflict in the

testimony of the plaintiff in error and the prosecuting witness as well be observed later.

On cross-examination, over objection the government was permitted to inquire of the plaintiff in error his association with the Industrial Workers of the World (Trans. 117-118.) It is respectfully contended that this was prejudicial error. It is a matter of common knowledge that the newspapers have been importunate to discredit the Industrial Workers of the World; also and the employing class have been active also in discrediting this union and with such conditions existing membership in such an organization is strictly prejudicial in this community. That membership in the Industrial Workers of the World is strictly prejudicial the plaintiff in error most respectfully cites the report of the President's Mediation Commission appointed in the fall of 1917 to effect settlement of labor disputes and unrest in the west, which report was submitted to the President January 9th, 1918. This commission spent two or three weeks gathering facts in Western Washington, and found and held that the unrest and agitation was attributed to the employing class and newspaper activities. That the members of the Industrial Workers of the World was in no sense disloyal. That labor is devoted to the purposes of the government in the prosecuting of the war as much so as any other part of society. The plaintiff in error

most respectfully contends that all inquiries and all evidence elicited by the government in reference to the Industrial Workers of the World was prejudicial.

Plaintiff in error further contends that the verdict of the jury is not supported by the evidence. That the court erred in denying the motion of the plaintiff in error for a new trial.

The evidence of the prosecuting witness, Murphy, is in all material parts uncorroborated. He does not claim to be accurate in the use of exact words. He heard part and part only of the conversation; other witnesses heard other things; Pettijohn, Young and others. The plaintiff in error is corroborated by the government's witness, Pettijohn and by Black, Martin and McKinstry. It appears from the testimony of Alec Black (Trans. 128-129) that as many as fourteen hundred meals a day were served to soldiers at the Hurley-Mason's dining room at Camp Lewis and from the testimony of Andy McKinstry (Trans. 131) same facts appear.

In considering all the evidence in the case the plaintiff in error most respectfully contends that the verdict cannot be sustained on the evidence.

Plaintiff in error most respectfully again contends that his motion for a directed verdict at the close of all the evidence should have been sustained and the

court erred in refusing to sustain the same.

It is contended that the court erred in refusing to charge the jury as requested by the plaintiff in error. Evidence had gone to the jury to the effect that the plaintiff in error was a member of the Industrial Workers of the World and had in his possession certain books. The plaintiff in error contends that the admission of such evidence would constitute prejudicial error for which the judgment would be reversed. In the first submitted instruction plaintiff in error sought to have the court inform the jury that all bias and prejudice resulting from the reception of such testimony should not be permitted to interfere with the verdict. (Trans. 145.) Requested instruction No. 2 would have directed the jury to presume the defendant's innocence of the offense, and that he was entitled to the benefit of this presumption until his guilt was established beyond a reasonable doubt. Requested instruction No. 3 informs the jury that where a conflict arises in the evidence it is the duty of the jury to reconcile such conflicting evidence insofar as the jury can with a view of the innocence of the defendant; that when two constructions can be placed upon the testimony that construction should be adopted by the jury that would support the presumption of the innocence of the defendant rather than the one that would support a presumption of guilt. Plaintiff in error contends that this was an instruction that he was

entitled to have given to the jury beyond all question of doubt. There was a conflict in this evidence. The prosecuting witness had testified diametrically opposite to the defendant, and there was a conflict between the evidence of the prosecuting witness and the other witnesses called on behalf of the government, and this evidence had to be reconciled. The testimony of all the witnesses could not be possibly accurate and it was the duty of the jury to reconcile it, and it was the duty of the court to instruct the jury that conflicting evidence should be reconciled with a view of the innocence of the defendant. A defendant is presumed innocent in a criminal case until his guilt is established beyond a reasonable doubt, and, when it is necessary to establish the innocence or guilt, and to reconcile conflicting evidence it is unquestionably the duty of the jury to reconcile conflicting evidence in favor of the defendant's innocence, and that the rejection on behalf of the court to give such submitted instruction would in itself entitle the plaintiff in error to a new trial.

The fifth and last submitted instruction informs the jury that before the plaintiff in error could be convicted on the first count it would have to appear that he made and conveyed false reports and statements, knowing the same to be false, and it must be shown that the same were made to someone in connection with

the military or naval forces of the United States. Plaintiff in error contends that this is a matter which should have been submitted to the jury; that the refusal invaded a primary right. The court observed in the presence of the jury on the hearing of the argument on the motion for a directed verdict: "It is for the jury to say what the defendant's intent was. Of course, if his intent was to help the government and help the soldiers, and increase the loyalty of the people who heard him, or those who might hear what he said, he would not be guilty; but if his intent was otherwise he may be guilty, and it is for the jury to determine what he said, and the circumstances and the manner in which he said it, what his intent was." (Trans. 102-103.) Plaintiff in error intends that the use of such words constitute prejudicial error.

From all these observations the plaintiff in error most respectfully contends that the judgment and sentence imposed upon him is erroneous and should be set aside and held for naught, and that his discharge should be ordered and that he be granted such other and further relief as to this honorable court may seem proper in the premises.

Wherefore, the plaintiff in error most respectfully prays that the judgment of the District Court be set aside and held for naught and that he be discharged from further answering herein and that these proceed-

ings in all respects be dismissed and for such other and further relief as to this honorable court may seem proper.

H. E. FOSTER,
Attorney for Plaintiff in Error.

Seattle, June 20, 1918.